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ACCOUNTABILITY

§1-3

People v. Woods, 2023 IL 127794 (3/23/23)

Defendant and her then-fiancé, Andrew Richardson, were charged with numerous offenses arising out of the physical abuse of defendant's 7-year-old son, Z.W. Evidence at trial was that a man walking his dog had encountered Z.W., alone, on a city sidewalk. Z.W. told the man he was going to a playground. The man observed visible scars and bruises on Z.W. and called the police. Z.W. told the police, a social worker, medical personnel, and others that both defendant and Richardson had struck him with various objects, including a baseball bat, a belt, and a wire cord. Additionally, Richardson held Z.W. against a burner on the stove, and defendant burned Z.W. with a hair iron. A physical examination revealed extensive injuries and scars consistent with Z.W.'s claims. Defendant testified that Z.W.'s injuries were either accidental or were caused by Richardson. The State argued that defendant was guilty both as a principal and under a theory of accountability, and defendant was convicted of four counts of aggravated battery of a child.

On appeal, defendant alleged instructional error in that the jury was given conflicting instructions on accountability. Specifically, the jury was given IPI Criminal 5.03, the general accountability instruction, which provides, in part, that a person is legally responsible for the conduct of another when she "knowingly...aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense." And, over a defense objection predicated on **People v. Pollock**, 202 Ill. 2d 189 (2002), the trial court gave the State's non-pattern instruction on parental accountability, which stated that, "[a] parent has a legal duty to aid a small child if the parent knows or should know about a danger to the child" and has the physical ability to protect the child.

The supreme court held that the parental accountability instruction was improper because it allowed for conviction based on a negligent mental state. But, the court concluded that directly conflicting instructions may be harmless where they do not concern a disputed essential issue in the case and thus there is no risk that the jury relied on the incorrect instruction. Here, defendant's knowledge for purposes of accountability was not an essential element because she was proved guilty beyond a reasonable doubt as a principal. Thus, the error in including the "should know" language was harmless.

The court noted that the parental accountability instruction at issue here was predicated on language which appears in the committee notes to IPI Criminal 5.03 which plainly misstates the law of accountability. While the court did not issue an amendment to the note, it did "suggest that until such time as the drafting committee

proposes an amendment, any instruction on parental accountability not include the 'should have known' language."

(Defendant was represented by Assistant Defender Matthew Daniels, Chicago.)

APPEAL

§§2-1(a), 2-6(c)

People v. Moore, 2023 IL App (4th) 210245 (3/21/23)

Upon affirming the trial court's denial of defendant's motion for leave to file a third successive post-conviction petition, the appellate court discussed defendant's history of frivolous pleadings and the sanctions available to combat abuse of the court system. First, under 730 ILCS 5/3-6-3(d), IDOC may revoke sentence credit. Additionally, a defendant may be ordered to pay filing fees and court costs under 735 ILCS 5/22-105(a). And, finally, sanctions can be imposed under Illinois Supreme Court Rules 137(a) and 375(b), including monetary sanctions. Accordingly, the court ordered defendant to show cause within 30 days why sanctions should not be imposed and also directed the clerk of the appellate court to not file any new appeals submitted by defendant until such time as defendant responded to the show-cause order and the court determined what action to take.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

BATTERY, ASSAULT & STALKING OFFENSES

§7-1(g)

People v. Whitehead, 2023 IL 128051 (3/23/23)

Defendant argued his aggravated battery conviction should be reduced to simple battery because the offense was not committed "on or about a public place of accommodation." The appellate court affirmed, finding that the front stoop of the victim's apartment, upon which the battery occurred, was a public place of accommodation pursuant to 720 ILCS 5/12-3.05(c).

The supreme court reversed the appellate court and reduced defendant's conviction to simple battery. As charged here, a person commits aggravated battery when the battery occurs "on or about a public way, public property, a public place of accommodation or amusement, a sports venue, or a domestic violence shelter." 720 ILCS 5/12-3.05(c). The stoop in this case was described as the area just outside an

apartment door, accessible via a paved walkway leading off the street. The State argued that a stoop can be classified as a "public place of accommodation" because it is accessible to the public, and the homeowner grants members of the public, such as mail carriers and visitors, an implied license to use the stoop.

Because the statute does not define "place of public accommodation," the court looked to various dictionary definitions and concluded that it is "a place for the use of the general public that is supplied for convenience, to satisfy a need, or to provide pleasure or entertainment." Under this definition, a front stoop does not qualify. The stoop's primary function is to give a resident access to the front door. While members of the public may also use the stoop, this function is secondary. A public place of accommodation is not just accessible to the public, it must be primarily used as "a place where the general public is invited to enjoy a good, service, or accommodation being provided." Notably, the authority relied upon by the State involved places owned by businesses.

Including stoops in the definition would not further the legislative intent of the statute, which was to protect the public from increased harm in public places. Given the primarily private nature of the area just outside a front door, to consider it a public place of accommodation would lead to an absurd result. And it would render other clauses of section 12-3.05(c), such as "public way," superfluous. Finally, the court found further support for its conclusion in the fact that the area was part of the apartment's curtilage, affording it heightened privacy protection under constitutional law and undermining the notion that it's a public place.

(Defendant was represented by Assistant Defender Zachary Wallace, Elgin.)

COLLATERAL REMEDIES

§§9-1(b)(4), 9-2(c)

People v. Clemons, 2023 IL App (1st) 192169 (3/31/23)

The trial court erred when it dismissed defendant's 2-1401 petition on the State's oral motion to dismiss without first giving defendant an opportunity to respond. But, that error was harmless because defendant's petition was procedurally barred by the two-year limitations period. But, the matter was remanded for further proceedings where the trial court's oral pronouncements in dismissing the petition, and the accompanying docket entries, half-sheets, and computer records, sometimes referred to the matter as a "PC" or "post-conviction." If the court meant to treat the matter as a post-conviction petition, it failed to provide defendant with the required admonishments for recharacterization. And, if it did not intend to recharacterize the petition, the court's reference to the matter as a PC created an extra hurdle for defendant to clear in the event he attempts to file a post-conviction petition in the

future. Accordingly, the appellate court ordered that, on remand, the trial court make clear whether it was treating the petition as a 2-1401 as filed or whether it was recharacterizing defendant's pleading as a post-conviction petition, in which case it must provide required protections.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

§9-1(i)(1)

People v. Profit, 2023 IL App (1st) 210881 (3/28/23)

There was no error in denying defendant leave to file a successive post-conviction petition arguing that the 2019 enactment of 730 ILCS 5/5-4.5-115(b) violated defendant's constitutional right to equal protection because it only applies prospectively. The appellate court affirmed, finding that defendant could not meet the prejudice prong of the cause-and-prejudice test for filing a successive petition.

Defendant was 18 years old at the time he committed the offenses of attempt first degree murder and armed robbery, and he was 20 when he was sentenced to a total of 36 years of imprisonment. The offenses occurred in 1998. Section 5-4.5-115(b) provides for parole review after 10 years for persons under 21 years old at the time of commission of an offense other than first degree murder, but it expressly limits its application to persons who are sentenced on or after June 1, 2019.

With regard to defendant's equal protection claim, defendant conceded that no suspect classification was involved, thereby leading to rational basis review. And, the legislature's inclusion of a prospective-only effective date was rationally related to considerations of finality and limited judicial resources. In reaching this conclusion, the court looked to **People v. Richardson**, 2015 IL 118255, which rejected a similar equal protection argument regarding the prospective-only amendment of the Juvenile Court Act to increase the age of juvenile court jurisdiction.

And, the court rejected defendant's reliance on its own prior statements in **People v. Metlock**, 2021 IL App (1st) 170946-U, where it said that the legislature's decision not to make the parole provision retroactive "caused a wide disparity" between those sentenced before and after its effective date and that the court could see "no rational or justifiable reason" for the disparity. With regard to those comments, the court said they were *dicta* and in opposition to **Richardson**.

§9-1(i)(2)

People v. Vidaurri, 2023 IL App (1st) 200857 (3/22/23)

In a successive petition, defendant alleged that his confession was the product of police abuse, primarily by Detective Adrian Garcia. He had alleged in a prior petition that counsel was ineffective for failing to move to suppress the confession, and the State therefore asserted the claim was barred by *res judicata*. Defendant countered that his current claim was supported by new evidence of a pattern and practice of police misconduct. This evidence included affidavits from other victims of abuse, testimony from a lawsuit, a settlement agreement, and a list of several allegations, albeit unfounded, documented by the Citizen's Police Data Project.

Newly discovered evidence of police coercion may provide cause for permitting the filing of a successive post-conviction because such evidence, by its nature, is difficult for *pro se* petitioners to obtain. Here, as in **People v. Blalock**, 2022 IL 126682, the documents in question were external to the defense, and some were in the custody of the police, who have a direct interest in keeping the information from defendants. Thus, defendant met the cause prong.

Defendant could not show prejudice, however. At the pleading stage, defendant establishes prejudice in a "pattern and practice" claim when: (1) the defendant consistently claims he was tortured; (2) his claims of torture were and always had been similar to other claims depicted in the new evidence; (3) the officers identified in the evidence were the same officers in the defendant's case; and (4) the defendant's allegations were consistent with documented findings of torture against the officers.

Here, the appellate court first found the list of allegations from the CPDP, as well as the evidence about the lawsuit, lacked sufficient detail to be assessed for similarity. As for the remaining evidence, the appellate court found each one individually deficient for several reasons, including a lack of similarity in the details. For example, one former victim of Garcia alleged, as defendant did, that Garcia used coercive techniques while the victim had one hand cuffed to the wall. But other than this "general" similarity, the remaining details of the allegations differed. Importantly, this victim did not allege physical violence, while defendant did.

Another victim's claims were insufficient because five years separated the conduct, the affiant accused "Garcia" without providing a first name, and the types of coercive techniques were not identical where the affiant said he was punched while defendant said he was slapped and defendant alleged sleep deprivation, while the affiant did not.

In sum, the supporting evidence, taken together, did not establish that Garcia engaged in a pattern and practice of abuse where some of the new allegations did not

name Detective Garcia, others failed to offer details of his actions, and others lacked sufficient similarity to defendant's allegations of abuse.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

§9-1(i)(2)

People v. Wimberly, 2023 IL App (1st) 220809 (3/23/23)

In a successive petition, the defendant alleged for the first time that his arrest pursuant to an investigative alert, rather than a warrant, was unconstitutional. The State first argued that defendant could not establish the cause prong of the cause and prejudice test. It noted that the claim was always available to him, and that some justices of the appellate court have voiced concerns about the use of investigative alerts in decisions dating back to 2012. The appellate court disagreed. New decisions can establish cause, and here defendant's initial petition was filed in 2011, before the justices' voiced concern about investigative alerts and, more importantly, before two appellate court decisions, **People v. Bass**, 2019 IL App (1st) 160640, aff'd in part, vacated in part, 2021 IL 125434, and **People v. Smith**, 2022 IL App (1st) 190691, which held for the first time that an arrest based on an investigative alert was unconstitutional.

The appellate court would not find prejudice, however. The court agreed with **People v. Braswell**, 2019 IL App (1st) 172810, which declined to follow **Bass** and found it wrongly decided. Like **Braswell** and the dissent in **Bass**, the court here found no reason to deviate from the supreme court's holding that the Illinois constitution provides the same protections as the fourth amendment. Under the fourth amendment, an arrest made without a warrant is valid if there is probable cause, regardless of whether that probable cause is attached to an investigative alert. The appellate court found no merit to the **Bass** court's belief that the Illinois constitution's requirement of a warrant supported by "affidavit" (rather than the federal constitution's requirement of "oath or affirmation") is a meaningful difference that justifies finding warrantless arrests based on probable cause, but made pursuant to an investigative alert, unconstitutional.

(Defendant was represented by Assistant Defender Christina Merriman, Chicago.)

§9-1(i)(3)

People v. Beard, 2023 IL App (1st) 200106 (3/30/23)

Where a defendant seeks leave to file a successive post-conviction petition on the basis of actual innocence, the relevant inquiry is whether the supporting evidence

is newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. With regard to whether evidence is newly discovered, some courts have erroneously conflated the analysis with the cause analysis for the cause-and-prejudice test. The appellate court clarified here that for evidence to be newly discovered, it must not have been discoverable prior to trial. Cause, on the other hand, focuses on whether the claim could have been included in a prior petition. But, a cause-and-prejudice analysis applies only to claims of trial error and has no place in assessing whether a defendant should be permitted leave to file a successive petition alleging actual innocence.

Here, defendant sought leave to file an actual innocence claim supported, in part, by information which was available to him when he filed his initial post-conviction petition. In that initial petition, defendant had raised actual innocence but he failed to attach supporting affidavits. Thus, the affidavits included with defendant's motion for leave to file a successive petition had never been considered on their merits. Two of the affidavits in question were from co-defendants in this matter and thus were newly discovered because "no amount of diligence could have forced them to testify" at defendant's trial. And, the third was from a witness who did not come into information to support defendant's claim of actual innocence until after defendant had been tried and convicted, and thus her affidavit was also newly discovered.

Regardless, defendant failed to state a colorable claim of actual innocence where the newly discovered evidence was not of such conclusive character as to probably change the result on retrial. Defendant was convicted of aggravated kidnaping on the basis of common-criminal-design accountability. Specifically, defendant knew of his co-defendants' plan to engage in a kidnaping for ransom, and the evidence established that defendant voluntarily attached himself to the criminal activity with knowledge of it. The victims were held in defendant's garage, and defendant admitted retrieving a cell phone for use in making the ransom demand and keeping watch over the victims in the garage while his co-defendants went on an errand. The newly discovered affidavits stating that defendant "didn't have anything to do with planning and pursuing the kidnaping" and that he "had no knowledge or involvement in the crime" were conclusory. Further, active participation is not required where a defendant is part of a common criminal design. Thus, the court did not err in denying defendant leave to file a successive post-conviction petition.

§9-1(j)(2)

People v. Turner, 2023 IL App (1st) 191503 (3/27/23)

The appellate court majority rejected defendant's claims that post-conviction counsel provided unreasonable assistance by failing to supplement the petition with documents that would support his various claims of ineffective assistance of trial

counsel, including his claim that counsel prevented him from testifying. The appellate court would not presume that any of the possible supporting documents suggested by defendant would help his case, given that the Rule 651(c) certificate filed by post-conviction counsel created a rebuttable presumption that no further amendments were necessary.

In upholding the dismissal, the appellate court rejected defendant's reliance on **People v. Jackson**, 2021 IL App (1st) 190263. In **Jackson**, the appellate court remanded a case to the second stage to determine whether PC counsel tried to obtain a specific piece of evidence in support of defendant's claim. The appellate court here found **Jackson** wrongly decided for several reasons, including its failure to acknowledge the rebuttable presumption. Disagreeing with defendant's argument that the record here, as in **Jackson**, was "silent" as to PC counsel's efforts, the appellate court noted that a 651(c) certificate does create a record by creating a presumption that counsel considered additional evidence but found it unnecessary. Unless contradictory evidence exists, the presumption remains in tact.

Finally, the majority rejected defendant's argument that PC counsel should have withdrawn rather than stand on issues that, without further documentation, cannot meet the second stage standard. **People v. Greer**, 212 Ill. 2d 192 (2004) does not require withdrawal unless further representation creates ethical issues, and requiring withdrawal raises its own set of concerns, such as making a record of potentially damaging information uncovered by counsel's investigation.

The dissent would have found unreasonable assistance based on the failure to provide defendant's affidavit in support of his claim that his right to testify was "impeded" by trial counsel. The dissent found the admonishments given to defendant about his right to testify were inadequate to capture the pressures he may have been under to not contradict his attorney's advice not to testify. The dissent noted that the ABA recommends much more detailed admonishments in order to truly determine voluntariness.

(Defendant was represented by Assistant Defender Adrienne Sloan, Chicago.)

§9-6

People v. Anderson, 2023 IL App (1st) 200462 (3/6/23)

Defendant submitted a claim under the Torture Inquiry and Relief Commission (TIRC) Act alleging that his convictions in two cases resulted from inculpatory statements which were coerced by police torture during his custodial interrogation in 1991. The Commission found sufficient evidence of torture to refer the matter to the circuit court for judicial review, but the court denied defendant any relief.

The appellate court disagreed with the circuit court and went on to reverse defendant's convictions and remand for new trials with the exclusion of defendant's inculpatory statements. The appellate court first found that the trial court failed to apply the proper initial inquiry to defendant's claim, specifically whether defendant showed that newly discovered evidence would likely have altered the result of a suppression hearing. While the court cited the correct standard, it improperly focused on whether it believed defendant's torture allegations. Here, defendant satisfied his burden by presenting ample evidence of a pattern and practice of abuse by the officers in question – including testimony of two individuals who had been tortured by some of the same officers during the same time frame, as well as documentary evidence in the form of affidavits, deposition transcripts, expert reports, and more, describing the abuse and torture of a number of other individuals at the hands of the same officers.

Additionally, the trial court improperly concluded that pattern-and-practice evidence was irrelevant to defendant's claim. As the appellate court noted, such evidence is "certainly relevant to show a pattern of abuse and coercion by the accused detectives." And, here, the evidence was sufficient to meet defendant's burden that it would likely have resulted in suppression of his custodial statements. Even those prior allegations that were deemed unfounded by the Office of Professional Standards were relevant to defendant's TIRC claim where those allegations were sufficiently similar to defendant's alleged abuse.

And, the State failed to meet its burden to prove that defendant's statements were, in fact, voluntary. The detectives involved in defendant's interrogations were well-known to the court, having been subject to numerous previous complaints of coerced confessions, including confessions which were later shown to be demonstrably false. Thus, the trial court's determination that the officers were credible when they denied abusing defendant, in the face of voluminous evidence of a pattern and practice to the contrary, was against the manifest weight of the evidence.

CONFESSIONS

§10-4(d)

People v. Ward, 2023 IL App (1st) 190364 (3/31/23)

Defendant was convicted of first degree murder and two counts of aggravated battery with a firearm arising from a 2013 shooting which resulted in the death of 15-year-old Hadiya Pendleton and injuries to two other teens, Lawrence Sellers and Sabastian Moore. The appellate court reversed and remanded for a new trial, concluding that the trial court erred in failing to suppress defendant's custodial statements because they were taken in violation of his right to remain silent.

Defendant's interrogation began shortly after midnight, with the giving of **Miranda** warnings. After a little more than an hour of questioning, defendant stated, "I ain't got nothin' else to say." Questioning stopped, and detectives left the room. Approximately 90 minutes later, the detectives returned and questioned defendant again. That questioning lasted about 45 minutes, at which time defendant said, "[I] [g]ot nothin' to say." The detectives again left the room. Approximately three hours later, after defendant was fingerprinted, the same two detectives attempted to initiate additional questioning, and defendant indicated he did not want to say anything else. Up to this point, defendant had not made any incriminating statements. Approximately five hours later, and twelve hours after the interrogation first began, a second pair of detectives questioned defendant. They did not provide defendant fresh **Miranda** warnings, and defendant ultimately made the inculpatory statements at issue here.

On these facts, the court concluded that defendant had repeatedly invoked his right to remain silent. Although defendant's invocations did not come immediately after he was given **Miranda** warnings, the court relied on **People v. Cox**, 2023 IL App (1st) 170761, in holding that a delay between warnings and invocation is not the determinative factor. More telling here was the response of defendant's interrogators. After each invocation, the detectives halted their questioning and left the room for some time, indicating that they plainly understood defendant's comments to be an invocation of his right to remain silent.

Once a defendant has invoked his right to silence, interrogation may be resumed and subsequent statements may be admissible only if the defendant's right to remain silent was "scrupulously honored." Here, the State argued only that defendant had not invoked his right to silence and did not even suggest that his invocation had been scrupulously honored. Accordingly, the court held that defendant's statements should have been suppressed.

Additionally, the court rejected the State's harmless error argument. While defendant's confession was not the focus of the State's closing argument at trial, closing arguments are not evidence. And, more importantly, the question was not whether the State believed at trial that the evidence was sufficient to convict without defendant's confession, but rather whether the State could "prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." Given that confessions carry significant weight, and that the trial evidence here was sufficient but not overwhelming, the court held that this was not "one of those rare cases" where it was beyond reasonable doubt that the jury would have found defendant guilty absent his confession.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

§10-5(a)

People v. Vidaurri, 2023 IL App (1st) 200857 (3/22/23)

In a successive petition, defendant alleged that his confession was the product of police abuse, primarily by Detective Adrian Garcia. He had alleged in a prior petition that counsel was ineffective for failing to move to suppress the confession, and the State therefore asserted the claim was barred by *res judicata*. Defendant countered that his current claim was supported by new evidence of a pattern and practice of police misconduct. This evidence included affidavits from other victims of abuse, testimony from a lawsuit, a settlement agreement, and a list of several allegations, albeit unfounded, documented by the Citizen's Police Data Project.

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Defendant could not show prejudice, however. At the pleading stage, defendant establishes prejudice in a "pattern and practice" claim when: (1) the defendant consistently claims he was tortured; (2) his claims of torture were and always had been similar to other claims depicted in the new evidence; (3) the officers identified in the evidence were the same officers in the defendant's case; and (4) the defendant's allegations were consistent with documented findings of torture against the officers.

Here, the appellate court first found the list of allegations from the CPDP, as well as the evidence about the lawsuit, lacked sufficient detail to be assessed for similarity. As for the remaining evidence, the appellate court found each one individually deficient for several reasons, including a lack of similarity in the details. For example, one former victim of Garcia alleged, as defendant did, that Garcia used coercive techniques while the victim had one hand cuffed to the wall. But other than this "general" similarity, the remaining details of the allegations differed. Importantly, this victim did not allege physical violence, while defendant did.

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In sum, the supporting evidence, taken together, did not establish that Garcia engaged in a pattern and practice of abuse where some of the new allegations did not

name Detective Garcia, others failed to offer details of his actions, and others lacked sufficient similarity to defendant's allegations of abuse.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

COUNSEL

§§14-1(e), 14-1(f)

People v. Talidis, 2023 IL App (2d) 220109 (3/29/23)

Prior to his DWLR trial, defendant's private attorney withdrew over a disagreement about discovery, and defendant moved to proceed *pro se*. The court accepted defendant's waiver of counsel. After six months of continuances so that defendant could file motions, defendant never filed any, and the court appointed standby counsel. Four days later, on the day of trial, defendant refused to participate. The court ordered standby counsel to act as counsel of record. Counsel asked for a continuance to prepare, but the trial court denied the motion, reasoning that an attorney appointed for a defendant tried *in absentia* need not be prepared for trial under 725 ILCS 5/115-4.1(a). Defendant was found guilty, and on appeal, argued the court erred in denying the request for a continuance.

The appellate court affirmed. It initially determined that section 115-4.1(a), which sets forth the procedures for a trial *in absentia*, including the appointment of counsel, did not apply to defendant. See **People v. Eppinger**, 2013 IL 114121 (section 115-4.1 applies only to defendants not in custody). As such, before reaching the ruling on the continuance, the appellate court first determined whether the court erred in appointing counsel despite defendant's desire to represent himself. The appellate court found a proper termination of the right to self-representation. Defendant intentionally disrupted the trial process, first dragging it out for several months with false assurances of an imminent motion, and then refusing to participate on the day of trial. Appointing counsel at this point was a proper exercise of discretion. For similar reasons, the trial court exercised proper discretion when it appointed standby counsel as the counsel of record.

Nor did the trial court error in denying counsel's request for a continuance. A court's decision to deny a continuance for the preparation of trial is reviewed for an abuse of discretion. Reviewing courts consider several factors, including the movant's diligence, the seriousness of the charges, judicial economy, the complexity of the case, and the reason for counsel's unpreparedness. Here, although counsel acted diligently in requesting the continuance, and only two witnesses would be inconvenienced, other factors supported the denial of the continuance, including the fact that counsel "had at least the lunch break to prepare for defendant's case, which was not complex."

Finally, the court found counsel was not ineffective where she participated in *voir dire*, made objections, moved to suppress evidence, cross-examined witnesses, and argued in opening and closing.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

§14-2

People v. Johnson, 2023 IL App (4th) 210662 (3/3/23)

At the time of defendant's ultimate decision to waive counsel, the trial court did not provide admonishments about the nature of the charges or the minimum or maximum sentences he faced, as required by Supreme Court Rule 401(a). Nevertheless, the appellate court held that the waiver was not invalid. Rule 401(a) requires substantial compliance, and any failure to comply will be overlooked if the record otherwise shows a knowing and intelligent waiver and lack of prejudice.

Here, the trial court twice admonished defendant in accordance with Rule 401(a), and only the third and final admonitions were imperfect. Defendant was also informed of the charges and sentencing ranges after the waiver, and subsequent to that was continually offered counsel up until the day before trial. He also made a conscious decision to prioritize his own *pro se* motions over the assistance of both his original private attorney and a public defender. Thus, the record showed a knowing and intelligent decision.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

§14-6(b)(1)

People v. Hill, 2023 IL App (1st) 150396 (3/24/23)

A *per se* conflict of interest existed where, prior to defendant's trial on a charge of first degree murder, defendant's trial counsel simultaneously represented an eyewitness to the murder on an unrelated criminal charge. That eyewitness initially had identified defendant as the offender and then later recanted that identification. The contemporaneous representation, which lasted for approximately one year, occurred after the recantation and terminated prior to defendant's trial.

The court held that defendant knowingly and intelligently waived the conflict. He was specifically admonished of the conflict by the trial court at a pretrial hearing, he confirmed his knowledge of the conflict, and he agreed that he was waiving the conflict. Additionally, the State had filed a motion to disqualify counsel because of the conflict, and that motion set out in detail the associated risks to defendant of proceeding with conflicted counsel. While there is no precise formula for ensuring

that a waiver is knowing and intelligent, the circumstances here were sufficient to show an adequate waiver, and the trial court did not abuse its discretion in accepting defendant's waiver.

§14-7(a)(3)

People v. Cook, 2023 IL App (4th) 210621 (3/9/23)

Defendant pled guilty to felony murder, then filed a motion to reconsider sentence within 30 days. He did not file a notice of motion as required by 730 ILCS 5/5-4.5-50(d). After no action was taken on the motion for a year, a PD discovered the motion and refiled it, along with a motion to withdraw the plea. The motion alleged that his plea was coerced and that his sentence was excessive. The trial court denied the motion.

On appeal, defendant alleged that comments critical of plea counsel, made during his testimony on the motion to withdraw, entitled him to a **Krankel** remand. The State argued the appeal should be dismissed for lack of jurisdiction because the notice of appeal was filed more than a year after the original motion.

The appellate court first held that it had jurisdiction. Defendant filed a timely motion to reconsider. Although the motion was not accompanied by a notice of motion, this defect was not jurisdictional. Section 5-4.5-50(d) states that a motion must be filed within 30 days to be considered timely. It does not state that a lack of notice of filing renders it untimely; no consequences are attached to the notice requirement. While this holding contradicts several prior cases, they all involved an earlier version of the statute which specifically stated a motion was timely filed only if it included a notice of motion.

Defendant was not entitled to a **Krankel** remand, however. While defendant made some statements during his testimony that could be considered critical of his attorney – he pled because his case was not "moving forward"; counsel did not inform him about a pending favorable statute; no one "helped" him with his case – the statements were contradicted by the record, and regardless, none amounted to"clear claims asserting ineffective assistance of counsel" required by **People v. Ayres**, 2017 IL 120071.

(Defendant was represented by Assistant Defender Brian Josias, Chicago.)

DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTING OFFENSES

§16-1(f)

People v. Perkins, 2023 IL App (5th) 220108 (3/2/23)

The appellate court upheld two counts of threatening a public official, finding the evidence sufficient to convict. The State alleged that defendant violated 720 ILCS 5/12-9(a-5) twice, in that he: (1) threatened injury to a police officer; and (2) threatened to break the window of the officer's squad car.

During an arrest, defendant told the arresting officers he was going to "surprise your ass;" that he would "drop one of you motherfuckers;" that he would "sit around and wait for your ass;" and that he would come to the police station tomorrow with "50 motherfuckers to fry your ass." The complainant officer testified that based on his experience he understood these statements to mean the defendant wanted to harm him, possibly shoot him, and that defendant planned to "lie in wait" or ambush him with a mob of people. Once arrested and placed in the squad car, defendant started kicking the car and threatened to kick out the windows.

Defendant argued on appeal that his words did not "contain specific facts indicative of a unique threat" to the officer, as required by the statute. Rather, they were "generalized threats of harm," which are exempted under the statute. He also pointed out that when he said he'd kick out the windows, he said he'd do so on the count of three, but voluntarily stopped at two, and never positioned his body in such a way as to kick out the windows The appellate court disagreed that defendant's statements did not meet the standards for threatening a public official, finding the above threats were "very specific."

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

§16-2

People v. Sadder-Bey, 2023 IL App (1st) 190027 (3/28/23)

The appellate court reversed defendant's conviction for resisting a peace officer, finding the evidence insufficient. Under 720 ILCS 5/31-1(a), the State must prove that the defendant "resisted or obstructed someone he knew was a peace officer, and that this obstruction or resistance actually impeded or hindered the officer from conducting an act that he or she was authorized to perform."

Here, defendant repeatedly refused to get out of his car when ordered to do so after failing to provide a driver's license during a traffic stop. But his refusal was temporary. Once an officer grabbed his arm and gave him a choice to get out or be pulled out, defendant submitted and exited the car. The question on appeal was

whether defendant's initial refusal to exit the car actually impeded or hindered the officer. Relying on obstruction of justice cases such as **Comage** and **Baskerville,** the appellate court held that to "actually impede[ ] or hinder[ ]" the officer, defendant must "materially interfere" with the authorized act. Defendant's "resistance" lasted two minutes, and was primarily argumentative rather than physical, and passive rather than active. Thus, it did not materially impede the officer.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

EXTRADITION

§20

People v. Swanson, 2023 IL App (3d) 210399 (3/10/23)

Defendant was incarcerated in Iowa when he was charged with forgery in Illinois. He was transferred to an Illinois jail for trial. While in Illinois, because he was charged with a category B offense, he was entitled to a $30 credit against his bond while incarcerated. 725 ILCS 5/110-14(c). Eventually, this credit reached the amount of his bond, entitling him to release.

Upon his release, he was transferred back to Iowa. Under the anti-shuttling provisions of the Interstate Agreement on Detainers, the forgery charges had to be dismissed as he was not brought to trial prior to being sent back to Iowa. 730 ILCS 5/3-8-9(a). The State appealed, arguing that defendant waived the anti-shuttling provisions by specifically requesting the credit against his bond. The appellate court disagreed, noting the credit is automatically applied pursuant to section 110-14(c).

(Defendant was represented by Assistant Defender Emily Brandon, Ottawa.)

GUILTY PLEAS

§24-8(a)

People v. Cook, 2023 IL App (4th) 210621 (3/9/23)

Defendant pled guilty to felony murder, then filed a motion to reconsider sentence within 30 days. He did not file a notice of motion as required by 730 ILCS 5/5-4.5-50(d). After no action was taken on the motion for a year, a PD discovered the motion and refiled it, along with a motion to withdraw the plea. The motion alleged that his plea was coerced and that his sentence was excessive. The trial court denied the motion.

On appeal, defendant alleged that comments critical of plea counsel, made during his testimony on the motion to withdraw, entitled him to a **Krankel** remand. The State argued the appeal should be dismissed for lack of jurisdiction because the notice of appeal was filed more than a year after the original motion.

The appellate court first held that it had jurisdiction. Defendant filed a timely motion to reconsider. Although the motion was not accompanied by a notice of motion, this defect was not jurisdictional. Section 5-4.5-50(d) states that a motion must be filed within 30 days to be considered timely. It does not state that a lack of notice of filing renders it untimely; no consequences are attached to the notice requirement. While this holding contradicts several prior cases, they all involved an earlier version of the statute which specifically stated a motion was timely filed only if it included a notice of motion.

Defendant was not entitled to a **Krankel** remand, however. While defendant made some statements during his testimony that could be considered critical of his attorney – he pled because his case was not "moving forward"; counsel did not inform him about a pending favorable statute; no one "helped" him with his case – the statements were contradicted by the record, and regardless, none amounted to"clear claims asserting ineffective assistance of counsel" required by **People v. Ayres**, 2017 IL 120071.

(Defendant was represented by Assistant Defender Brian Josias, Chicago.)

§24-8(b)(2)

People v. Taylor, 2023 IL App (1st) 171631 (3/20/23)

Rule 604(d) certificate was deficient where counsel did not certify that he consulted with defendant about alleged errors in his sentence or that he examined the report of proceedings of the sentencing hearing. While defendant entered a negotiated plea and later filed only a motion to withdraw plea, thus restricting his options with regard to challenging his sentence, Rule 604(d) is concerned with counsel's duty to consult with his client. Such consultation has value, even if it does not ultimately affect the content of the motion. The matter was remanded to the circuit court for new post-plea proceedings.

(Defendant was represented by Assistant Defender Manuel Serritos and Supervisor Linda Olthoff, Chicago.)

JUDGE

§31-3(d)

People v. Reyes, 2023 IL App (2d) 210423 (3/22/23)

Defendant was convicted of murder and two counts of attempt murder committed at age 16. In **People v. Reyes**, 2016 IL 119271, the supreme court found his original sentence of 97 years an unconstitutional mandatory life sentence under **Miller**. On remand, the trial court sentenced defendant to 66 years, and the appellate court vacated the sentence, finding another **Miller** violation. On remand, the trial court again imposed a 66-year sentence.

The appellate court vacated the sentence again. The sentencing court committed several errors in its application of 730 ILCS 5/-4.5-105(a). First, it relied on an Adult Risk Assessment to measure defendant's recidivism risk. Several factors in this assessment were inapplicable to juveniles, including whether defendant lived in a high-crime area, completion of high school, and securing of employment. And the assessment failed to consider the greater rehabilitative potential of young offenders. Also, it was improper to consider the assessment where it was not listed in section 5-4.5-105(a), which allows a sentencing court to consider other evidence, but only in mitigation.

Second, the sentencing court erroneously found defendant was able consider the risks and consequences of his behavior. To the contrary, defendant was 16 at the time of the offense and his low intelligence put his mental age at about two years behind peers of the same age. As the sentencing court itself found, defendant would act impulsively despite suffering adverse consequences, showing that he was unable to consider consequences. Finally, the court improperly gave "great weight" to the aggravating factor that defendant's conduct caused or threatened serious harm, despite the fact that this factor was inherent in the offenses.

Defendant also alleged the *de facto* life sentence was unconstitutional because the sentencing court found some rehabilitative potential and did not find defendant irredeemable. The appellate court declined to consider the issue, finding it could vacate the sentence on non-constitutional grounds.

Finally, given the sentencing court's failure to comply with the first mandate, a majority of the appellate court appointed a different judge on remand. Although the trial court ruled that under **Jones v. Mississippi**, 141 S. Ct. 1307 (2021), it was free to impose a life sentence without an explicit finding of incorrigibility, the appellate court pointed out that **Jones** also held that state courts may require sentencers to make certain additional findings. Here, the mandate of the appellate court explicitly commanded the sentencing court to sentence defendant to life *only* if it determines defendant is beyond rehabilitation.

(Defendant was represented by Assistant Defender Christopher Gehrke, Chicago.)

JURY

§32-5(a)

People v. Marks, 2023 IL App (3d) 200445 (3/20/23)

During voir dire, defense counsel asked a member of the venire if he agreed that "African Americans [are] more likely to commit crimes than whites." The veniremember responded, "Yes, it seems that way. You know? If you watch the news, you—yes." When the court questioned him, he stated that he believed he could be fair and impartial during trial and that he had not read or heard anything about the case. The veniremember ultimately served on the jury.

Defendant argued the trial court violated due process by allowing this juror to serve, and that counsel was ineffective for failing to strike the juror. The appellate court disagreed. A trial court has no affirmative duty to remove jurors *sua sponte*. While a defendant may show that a trial court abused its discretion if its *voir dire* "thwarted the selection of an impartial jury," the defendant could not point to anything unfair about the *voir dire*. The court allowed defense counsel to ask this question, and the court excused another veniremember who provided a similar answer.

Nor was counsel ineffective. Counsel's choices during jury selection are matters of trial strategy and "virtually unchallengeable." Based on the fact that counsel challenged other veniremembers, and chose not to use an available peremptory challenge on this juror, the appellate court found counsel's decision was strategic. The court also found no prejudice because the juror stated he could be impartial, and defendant could not show that the absence of this juror would have led to a different result on retrial.

§32-8(c)

People v. Woods, 2023 IL 127794 (3/23/23)

Defendant and her then-fiancé, Andrew Richardson, were charged with numerous offenses arising out of the physical abuse of defendant's 7-year-old son, Z.W. Evidence at trial was that a man walking his dog had encountered Z.W., alone, on a city sidewalk. Z.W. told the man he was going to a playground. The man observed visible scars and bruises on Z.W. and called the police. Z.W. told the police, a social worker, medical personnel, and others that both defendant and Richardson had

struck him with various objects, including a baseball bat, a belt, and a wire cord. Additionally, Richardson held Z.W. against a burner on the stove, and defendant burned Z.W. with a hair iron. A physical examination revealed extensive injuries and scars consistent with Z.W.'s claims. Defendant testified that Z.W.'s injuries were either accidental or were caused by Richardson. The State argued that defendant was guilty both as a principal and under a theory of accountability, and defendant was convicted of four counts of aggravated battery of a child.

On appeal, defendant alleged instructional error in that the jury was given conflicting instructions on accountability. Specifically, the jury was given IPI Criminal 5.03, the general accountability instruction, which provides, in part, that a person is legally responsible for the conduct of another when she "knowingly...aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense." And, over a defense objection predicated on **People v. Pollock**, 202 Ill. 2d 189 (2002), the trial court gave the State's non-pattern instruction on parental accountability, which stated that, "[a] parent has a legal duty to aid a small child if the parent knows or should know about a danger to the child" and has the physical ability to protect the child.

The supreme court held that the parental accountability instruction was improper because it allowed for conviction based on a negligent mental state. But, the court concluded that directly conflicting instructions may be harmless where they do not concern a disputed essential issue in the case and thus there is no risk that the jury relied on the incorrect instruction. Here, defendant's knowledge for purposes of accountability was not an essential element because she was proved guilty beyond a reasonable doubt as a principal. Thus, the error in including the "should know" language was harmless.

The court noted that the parental accountability instruction at issue here was predicated on language which appears in the committee notes to IPI Criminal 5.03 which plainly misstates the law of accountability. While the court did not issue an amendment to the note, it did "suggest that until such time as the drafting committee proposes an amendment, any instruction on parental accountability not include the 'should have known' language."

(Defendant was represented by Assistant Defender Matthew Daniels, Chicago.)

JUVENILE PROCEEDINGS

§33-3

People v. Marks, 2023 IL App (3d) 200445 (3/20/23)

The juvenile court did not err in transferring defendant's case to adult court. Defendant was charged first degree murder for a shooting committed at age 14. In Illinois, a minor 13 or older may be prosecuted as an adult if the State files a motion requesting transfer and the juvenile court finds probable cause to believe the allegations in the motion are true and proceeding in juvenile court is not in the best interests of the public. 705 ILCS 405/5-805(3)(a). Before approving a transfer, the juvenile court must make factual findings as to the statutory factors listed in section 805(3)(b). On review, the appellate court does not reweigh the factors; rather, it determines whether there was sufficient evidence for the factors relied upon to support the transfer.

Here, the juvenile court considered all the statutory factors before concluding a transfer was appropriate. It considered defendant's age, prior delinquent history, and seriousness of the offense. It appropriately placed greater weight on defendant's criminal history and the seriousness of the current charge. It considered evidence of domestic violence in defendant's household, but noted he was not personally abused. It also considered defendant's mental health, physical health, and education, finding defendant tested on the low end but did not have any disabilities. The juvenile court found probable cause to believe defendant committed a violent, premeditated crime, and that he would not meaningfully participate in any juvenile programs if he remained in juvenile court.

These findings were all based on the evidence and arguments presented from both parties, and therefore were not an abuse of discretion. Defendant challenged the court's finding regarding his test scores, pointing out that the expert admitted he could not determine defendant's true intellectual ability, and also challenged the court's finding that the lack of personal abuse mitigated the domestic violence. But both of these findings were reasonably based on the evidence presented. Finally, the juvenile court did not neglect to consider defendant's rehabilitative potential given his prior delinquency for armed robbery, the commission of the instant offense weeks after being taken off electronic monitoring, his possession of firearms, and his attack on an employee at the juvenile detention center.

§33-6(g)(2)

People v. Reyes, 2023 IL App (2d) 210423 (3/22/23)

Defendant was convicted of murder and two counts of attempt murder committed at age 16. In **People v. Reyes**, 2016 IL 119271, the supreme court found

his original sentence of 97 years an unconstitutional mandatory life sentence under **Miller**. On remand, the trial court sentenced defendant to 66 years, and the appellate court vacated the sentence, finding another **Miller** violation. On remand, the trial court again imposed a 66-year sentence.

The appellate court vacated the sentence again. The sentencing court committed several errors in its application of 730 ILCS 5/-4.5-105(a). First, it relied on an Adult Risk Assessment to measure defendant's recidivism risk. Several factors in this assessment were inapplicable to juveniles, including whether defendant lived in a high-crime area, completion of high school, and securing of employment. And the assessment failed to consider the greater rehabilitative potential of young offenders. Also, it was improper to consider the assessment where it was not listed in section 5-4.5-105(a), which allows a sentencing court to consider other evidence, but only in mitigation.

Second, the sentencing court erroneously found defendant was able consider the risks and consequences of his behavior. To the contrary, defendant was 16 at the time of the offense and his low intelligence put his mental age at about two years behind peers of the same age. As the sentencing court itself found, defendant would act impulsively despite suffering adverse consequences, showing that he was unable to consider consequences. Finally, the court improperly gave "great weight" to the aggravating factor that defendant's conduct caused or threatened serious harm, despite the fact that this factor was inherent in the offenses.

Defendant also alleged the *de facto* life sentence was unconstitutional because the sentencing court found some rehabilitative potential and did not find defendant irredeemable. The appellate court declined to consider the issue, finding it could vacate the sentence on non-constitutional grounds.

Finally, given the sentencing court's failure to comply with the first mandate, a majority of the appellate court appointed a different judge on remand. Although the trial court ruled that under **Jones v. Mississippi**, 141 S. Ct. 1307 (2021), it was free to impose a life sentence without an explicit finding of incorrigibility, the appellate court pointed out that **Jones** also held that state courts may require sentencers to make certain additional findings. Here, the mandate of the appellate court explicitly commanded the sentencing court to sentence defendant to life *only* if it determines defendant is beyond rehabilitation.

(Defendant was represented by Assistant Defender Christopher Gehrke, Chicago.)

PAROLE, PARDONS & PRISONERS' RIGHTS

§36-1(a)

People v. Melvin, 2023 IL App (4th) 220405 (3/24/23)

Defendant was not entitled to withdraw his plea despite the court's erroneous admonishment and order that he would serve no MSR. While the legislature amended 730 ILCS 5/5-8-1 to eliminate MSR for a Class 4 felony, the effective date of that amendment was twice delayed such that defendant was still subject to a one-year MSR term. But, because defendant was also serving a consecutive 10-year sentence, with an 18-month MSR term, he would not serve the required one-year MSR term despite the court's error. When a defendant receives consecutive sentences for multiple felonies, the sentences are treated as a single term, and the defendant serves only the MSR term corresponding to the most serious offense. Thus, defendant is still receiving the benefit of his bargain.

(Defendant was represented by Assistant Defender Gregory Peterson, Springfield.)

SEARCH & SEIZURE

§§43-1(b), 43-1(d)(2), 43-3(c)(3)(a)

People v. Erwin, 2023 IL App (1st) 200936 (3/31/23)

Defendant was denied leave to file a successive post-conviction petition alleging an improper arrest pursuant to an investigative alert, based on the now-vacated reasoning of **People v. Bass**, 2019 IL App (1st) 160640, aff'd in part & vacated in part, 2021 IL 125434, and reiterated in **People v. Smith**, 2022 IL App (1st) 190691.

The appellate court affirmed. The majority declined to decide the investigative alert issue because, even if the appellate court now agreed that the practice is unconstitutional, the officers who made the arrest would have been acting under a reasonable belief that their conduct was constitutional. Thus, the good-faith exception to the exclusionary rule would apply, and defendant would not be entitled to the suppression of his confession. For this reason alone, defendant could not show prejudice, and therefore could not be granted leave to file his successive petition.

A special concurrence would have affirmed based on the failure to establish cause, where the claim rests on a provision of the Illinois Constitution that has existed since the 1800's. Finding a lack of prejudice based on the exclusionary rule, on the other hand, is premature given the lack of a record on the issue.

(Defendant was represented by Assistant Defender Eric Castañeda, Chicago.)

§43-3(c)(3)(b)

People v. Wimberly, 2023 IL App (1st) 220809 (3/23/23)

In a successive petition, the defendant alleged for the first time that his arrest pursuant to an investigative alert, rather than a warrant, was unconstitutional. The State first argued that defendant could not establish the cause prong of the cause and prejudice test. It noted that the claim was always available to him, and that some justices of the appellate court have voiced concerns about the use of investigative alerts in decisions dating back to 2012. The appellate court disagreed. New decisions can establish cause, and here defendant's initial petition was filed in 2011, before the justices' voiced concern about investigative alerts and, more importantly, before two appellate court decisions, **People v. Bass**, 2019 IL App (1st) 160640, aff'd in part, vacated in part, 2021 IL 125434, and **People v. Smith**, 2022 IL App (1st) 190691, which held for the first time that an arrest based on an investigative alert was unconstitutional.

The appellate court would not find prejudice, however. The court agreed with **People v. Braswell**, 2019 IL App (1st) 172810, which declined to follow **Bass** and found it wrongly decided. Like **Braswell** and the dissent in **Bass**, the court here found no reason to deviate from the supreme court's holding that the Illinois constitution provides the same protections as the fourth amendment. Under the fourth amendment, an arrest made without a warrant is valid if there is probable cause, regardless of whether that probable cause is attached to an investigative alert. The appellate court found no merit to the **Bass** court's belief that the Illinois constitution's requirement of a warrant supported by "affidavit" (rather than the federal constitution's requirement of "oath or affirmation") is a meaningful difference that justifies finding warrantless arrests based on probable cause, but made pursuant to an investigative alert, unconstitutional.

(Defendant was represented by Assistant Defender Christina Merriman, Chicago.)

§§43-6(a), 43-6(c)

People v. Drain, 2023 IL App (4th) 210355 (3/3/23)

Defendant challenged the trial court's denial of his motion to suppress evidence, arguing, among other things, that there was no probable cause for the traffic stop, that the stop was unreasonably prolonged to conduct a canine sniff, and that the State failed to establish the canine's reliability. The appellate court affirmed.

Defendant was stopped for a violation of Scott's Law, which requires that, when approaching a stationary emergency vehicle with its warning lights activated, a motorist must move into the non-adjacent lane of traffic or reduce speed if changing lanes would be impossible or unsafe. Defendant asserted that it was not possible for him to switch lanes because there was a semi truck in the lane next to him and that instead he reduced speed. The trial court found, however, that defendant could have safely slowed and moved into the left lane behind the semi truck. The appellate court affirmed on the basis that the trial court's findings were not against the manifest weight of the evidence where the officer testified that the road was flat, nothing obstructed defendant's view of emergency vehicle ahead of him, and traffic was light, all of which would have allowed defendant ample opportunity to slow down and change lanes.

The appellate court also held that the traffic stop was not unreasonably prolonged for a canine sniff. The officer who initiated the stop ran a check on defendant's driver's license and was in the process of writing defendant a warning when a second officer arrived. Upon arrival, the second officer took over the task of completing the warning, while the original officer conducted the canine sniff. Defendant's assertion that the original officer intentionally delayed completion of the warning was unsupported where defendant did not introduce any evidence about how long it would have taken a reasonably diligent officer to perform that task.

Finally, the appellate court rejected defendant's challenge to the reliability of the canine sniff. The canine officer testified that he was a trained canine officer, that his canine was trained to alert to narcotics, and that his canine exhibited distinct changes in behavior when alerting. Defendant did not challenge that testimony and did not present any evidence to suggest that the canine was unreliable. Accordingly, the trial court properly found that the canine alert provided probable cause to search defendant's vehicle.

SENTENCING

§44-1(b)(2)

People v. Melvin, 2023 IL App (4th) 220385 (3/3/23)

Defendant argued that one of his convictions and sentences for Class X predatory criminal sexual assault of a child violated the proportionate penalties clause because, as charged, it had the same elements as aggravated criminal sexual abuse, a Class 2 felony. In raising this argument, defendant focused on the specific allegations that served as the basis for the predatory criminal sexual assault conviction in question.

An identical elements challenge under the proportionate penalties clause can only be brought as a facial challenge, not as an as-applied challenge. The identical elements test is wholly objective, meant to compare the offenses as defined by the legislature. It does not consider the offenses as charged against an individual defendant. Thus, the court declined to address defendant's fact-specific challenge as it was legally unavailable.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

§44-1(c)(2)

People v. Reyes, 2023 IL App (2d) 210423 (3/22/23)

Defendant was convicted of murder and two counts of attempt murder committed at age 16. In **People v. Reyes**, 2016 IL 119271, the supreme court found his original sentence of 97 years an unconstitutional mandatory life sentence under **Miller**. On remand, the trial court sentenced defendant to 66 years, and the appellate court vacated the sentence, finding another **Miller** violation. On remand, the trial court again imposed a 66-year sentence.

The appellate court vacated the sentence again. The sentencing court committed several errors in its application of 730 ILCS 5/-4.5-105(a). First, it relied on an Adult Risk Assessment to measure defendant's recidivism risk. Several factors in this assessment were inapplicable to juveniles, including whether defendant lived in a high-crime area, completion of high school, and securing of employment. And the assessment failed to consider the greater rehabilitative potential of young offenders. Also, it was improper to consider the assessment where it was not listed in section 5-4.5-105(a), which allows a sentencing court to consider other evidence, but only in mitigation.

Second, the sentencing court erroneously found defendant was able consider the risks and consequences of his behavior. To the contrary, defendant was 16 at the time of the offense and his low intelligence put his mental age at about two years behind peers of the same age. As the sentencing court itself found, defendant would act impulsively despite suffering adverse consequences, showing that he was unable to consider consequences. Finally, the court improperly gave "great weight" to the aggravating factor that defendant's conduct caused or threatened serious harm, despite the fact that this factor was inherent in the offenses.

Defendant also alleged the *de facto* life sentence was unconstitutional because the sentencing court found some rehabilitative potential and did not find defendant irredeemable. The appellate court declined to consider the issue, finding it could vacate the sentence on non-constitutional grounds.

Finally, given the sentencing court's failure to comply with the first mandate, a majority of the appellate court appointed a different judge on remand. Although the trial court ruled that under **Jones v. Mississippi**, 141 S. Ct. 1307 (2021), it was free to impose a life sentence without an explicit finding of incorrigibility, the appellate court pointed out that **Jones** also held that state courts may require sentencers to make certain additional findings. Here, the mandate of the appellate court explicitly commanded the sentencing court to sentence defendant to life *only* if it determines defendant is beyond rehabilitation.

(Defendant was represented by Assistant Defender Christopher Gehrke, Chicago.)

§44-2

People v. Brown, 2023 IL App (4th) 220400 (3/13/23) 2023 WL 2470983

In 2019, defendant was convicted of DWLR and sentenced to 9 years of imprisonment. The DWLR offense was a Class 2 felony because defendant's driver's license was revoked for a DUI violation and defendant had at least 14 prior DWLR violations. And, defendant was sentenced as a Class X offender pursuant to 730 ILCS 5/5-4.5-95(b), based on his having two prior Class 2 or greater felony convictions. Subsequently, in 2021, and while post-plea proceedings were pending in the trial court pursuant to an earlier appellate court remand, the sentencing statute was amended to require Class X sentencing only for Class 1 or 2 forcible felonies. Defendant's conviction would not have qualified under the amended statute. On appeal, defendant sought a remand for resentencing in light of the amendment.

The appellate court held that defendant was not entitled to resentencing due to the amendment of Section 5-4.5-95(b). The court concluded that not only did defendant not raise such a claim in post-plea proceedings in the circuit court, but he invited any error in not applying the amended version of the statute below because post-plea counsel had explicitly stated that the amendment was not retroactive.

The appellate court also rejected defendant's argument on the merits, holding that the amended version of Section 5-4.5-95(b) was not applicable to defendant's case regardless of counsel's failure to assert the issue. The appellate court cited **People v. Hunter**, 2017 IL 121306, in support of its conclusion that statutory amendments which mitigate punishment cannot be applied to defendants who were sentenced before the amendment took effect, regardless of whether their case remained pending in the trial court. In so holding, the court rejected defendant's argument that **Hunter** was distinguishable on the basis that the amendment there took effect while the defendants' cases were pending on appeal and not in the trial court.

(Defendant was represented by Assistant Deputy Christopher McCoy, Elgin.)

§§44-4(f), 44-14(b)

People v. Garcia, 2023 IL App (1st) 172005 (3/31/23)

Defendant alleged that his 100-year aggregate sentence for aggravated criminal sexual assault and kidnaping was unconstitutional, excessive, and a "trial tax" for rejecting a plea offer and going to trial. The appellate court found the sentence constitutional, but agreed that second-prong plain error occurred. The sentence was excessive in that it did not adequately take into account defendant's intellectual disabilities or prospects for rehabilitation, and the plea-trial sentencing disparity suggested defendant was penalized for exercising his right to trial.

Defendant was charged with four Class X counts requiring consecutive sentencing. He rejected a 36-year plea offer, and after trial, received four consecutive terms of 25 years.

The appellate court agreed that the record showed an impermissible plea-trial sentencing disparity. The 100-year sentence represented a 177% increase over the 36 year offered at the plea conference. Rather than a sentence allowing for release at age 56, defendant received a *de facto* life sentence.

While a plea-trial sentencing disparity, standing along, generally cannot form the basis of a "trial tax" claim, this disparity was so excessive (the court found an increase of 15-60% the norm) that it could not be explained by anything other than punishment for going to trial. In support, the appellate court noted the displeasure expressed by the trial judge, who made several antagonistic comments about defense counsel during trial. The State, on the other hand, suggested that the increase could be attributed to additional aggravating facts adduced at trial, or to the victim's statement at sentencing. But these potential factors could not explain the disparity because the trial court already knew the major details about the case when it made the 36-year offer.

Though the State argued that a "plea discount" is a benefit to defendants, the appellate court found the argument unavailing given that almost all criminal defendants now plead guilty. The court concluded that a sentencing court should give proper consideration for a prior plea offer when determining punishment after trial, and noted that the ABA has proposed, and several states have adopted, a rule whereby sentencing courts must explicitly list the factors relied upon when increasing the sentence beyond the term offered in a plea.

The appellate court further found in regard to defendant's intellectual disabilities (low IQ, ADHD, behavioral issues) that, while defendant's constitutional claim must fail under **People v. Coty**, 2018 IL App (1st) 162383, his argument that the court failed to adequately consider them in sentencing was meritorious. First, the court erred when it sentenced defendant without all necessary information, having

accepted the pre-sentence investigator's excuse that he couldn't secure defendant's signature for release of medical records because defendant was in jail. Second, the court misapprehended the nature of an intellectual disability by dismissing certain documents as "14 years old," ignoring the **Coty** holding that such disabilities are immutable.

Finally, the sentencing court failed to consider defendant's potential for rehabilitation. A life sentence suggests no prospect for rehabilitation, yet defendant had no violent criminal history, and the court failed to explore how his intellectual disabilities may have influenced his behavior.

(Defendant was represented by Assistant Defender Matthew Daniels, Chicago.)

§44-10

People v. Mosley, 2023 IL App (1st) 200309 (3/23/23)

Generally, UUWF is a Class 3 felony with a 2-to-10-year sentencing range, but if the defendant has previously been convicted of a forcible felony, then UUWF is a Class 2 felony with a 3-to-14-year range. Forcible felonies are defined at 720 ILCS 5/2-8, and include robbery but not attempt robbery. In addition to listing specific offenses which qualify, section 2-8 also includes a residual clause for "any other felony which involves the use or threat of physical force or violence against any individual."

As a matter of second-prong plain error, the appellate court agreed with defendant that the State failed to prove that his prior attempt robbery conviction was a forcible felony. Not every attempt to commit a forcible felony will be itself a forcible felony. Because attempt robbery may be committed without using or threatening violence, it does not necessarily involve the use or threat of force of violence sufficient to bring it within reach of the residual clause of Section 2-8. In reaching this conclusion, the court looked to the United States Supreme Court's recent decision in **United States v. Taylor**, 142 S. Ct. 2015 (2022), which concluded that an attempt robbery with similar elements did not constitute a "crime of violence" where proof of the offense did not require proof that the defendant "used, attempted to use, or threatened to use force."

Because defendant's attempt robbery conviction was not a forcible felony, the court erred in sentencing him for a Class 2 UUWF rather than a Class 3 UUWF. While defendant's 10-year sentence fell within the range for either, the court's conclusion that defendant had a "violent" background may have influenced the severity of the sentence it imposed and thus a remand for resentencing was required.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

SEX OFFENSES

§45-2(a)

People v. Melvin, 2023 IL App (4th) 220385 (3/3/23)

Defendant challenged one of his convictions of predatory criminal sexual assault of a child on the basis that the State failed to prove sexual penetration as charged. The count in question alleged that defendant had committed an act of sexual penetration by placing his finger inside K.A.'s vagina. Defendant argued that K.A.'s testimony and out-of-court statements were not specific enough to prove an intrusion by his finger into K.A.'s vagina. The appellate court disagreed. K.A. testified at trial that defendant touched her vagina with his mouth and hands. In her child advocacy center interview, which was admitted as substantive evidence at trial, K.A. said that defendant touched her private parts with his finger and wiggled his finger "down there," which made her body feel "horrible." And, when he was interviewed by a detective, and before being confronted with the specific conduct alleged, defendant volunteered that he had never put his penis, fingers, or tongue in K.A. Taking all of this evidence in the light most favorable to the prosecution, the court found that defendant had been proved guilty beyond a reasonable doubt of the specific allegations in question.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

§45-4

People v. Melvin, 2023 IL App (4th) 220405 (3/24/23)

Presence – either actual or virtual – is a necessary element in proving a charge of sexual exploitation of a child pursuant to 720 ILCS 5/11-9.1(a). That is, an individual must do the prohibited acts in the presence of a child in order to be found guilty of sexual exploitation of a child. "Virtual presence" is defined as an "environment that is created with software and presented to the user and or receiver via the Internet, in such a way that the user appears in front of the receiver on the computer monitor or screen or hand-held portable electronic device, usually through a web camming program. 'Virtual presence' includes primarily experiencing through sight or sound, or both, a video image that can be explored interactively at a personal computer or hand-held communication device or both."

Defendant argued that the State's factual basis for his guilty plea to sexual exploitation of a child was deficient in that it failed to establish his "virtual presence." Specifically, defendant argued that his sending of digital photographs of his exposed penis to a Facebook account which he believed to belong to a 16-year-old girl was insufficient to establish his "virtual presence" as a matter of law. Defendant relied on **People v. White**, 2021 IL App (4th) 200354, where the Court found Snapchat

photographs, with no conversation between the sender and the recipient, were insufficient to establish that the sender had exposed herself in the virtual presence of the recipient.

The court distinguished **White** both procedurally and factually. First, **White** involved a trial, while the instant matter involved a guilty plea. Thus, the court here did not have a fully developed record. A factual basis is not a substitute for proof beyond a reasonable doubt, but rather is for the purpose of ensuring a defendant does not plead guilty to a crime he did not commit. Here, the State's factual basis, coupled with defendant's admission to committing the offense, was adequate. As to the facts, the court noted that defendant here sent the explicit images in the context of an ongoing lewd conversation between himself and the recipient, rather than sending photographs only as in **White**. This was sufficient to satisfy the "virtual presence" element, at least on the limited record available in this guilty plea case.

The court also rejected defendant's argument that his convictions for both sexual exploitation and distribution of harmful materials were improper on one-act, one-crime grounds. While both involved the physical act of sending pictures of his exposed penis, sexual exploitation contains the additional act of presence. Further, while defendant made no argument that one offense was a lesser-included of the other, the court engaged in a brief lesser-included-offense analysis and concluded that under the abstract elements approach, the Class A misdemeanor sexual-exploitation offense's inclusion of the virtual-presence element rendered it not a lesser-included offense of Class 4 distribution of harmful materials which contains no presence requirement.

(Defendant was represented by Assistant Defender Gregory Peterson, Springfield.)

SPEEDY TRIAL

§§46-1(b)(1), 46-5(c)

People v. Mayfield, 2023 IL 128092 (3/23/23)

In March 2020, the Illinois Supreme Court issued a series of emergency administrative orders in response to the COVID-19 pandemic, including an order authorizing circuit courts to toll 725 ILCS 5/103-5(a), the speedy trial statute. Defendant had been arrested on charges of domestic battery on February 16, 2020, and remained in custody awaiting trial. Defendant answered ready for trial within the 120-day statutory speedy trial term and objected to any further delay, but his case was continued in accordance with the administrative orders. On August 11, 2020, counsel moved to dismiss the charges on speedy trial grounds. That motion was denied. Ultimately, defendant was tried and convicted on September 9, 2020.

On appeal, defendant argued that the administrative orders tolling the speedy-trial statute were unconstitutional in that they violated the separation of powers clause of the Illinois constitution by infringing on the authority of the legislature to enact laws. The appellate court disagreed, holding that the scheduling of criminal trials is a matter of procedure and thus within the primary purview of the courts, not the legislature.

The supreme court also rejected defendant's challenge, concluding that the administrative orders were an appropriate exercise of its general administrative and supervisory authority over all state courts under article VI, section 16 of the Illinois constitution. While the legislative and judicial branches traditionally have overlapping authority to regulate court procedure, the circuit court here was not bound to follow the speedy trial statute because the supreme court had expressly authorized its tolling under its "general administrative and supervisory authority." Because the conflict between the speedy trial statute and the court's administrative orders concerned court procedure, the administrative orders prevail.

(Defendant was represented by Assistant Defender Zachary Wallace, Elgin.)

§46-5(a)

People v. Johnson, 2023 IL App (4th) 210662 (3/3/23)

Defendant alleged a speedy trial violation where the trial court tolled the speedy trial statute in accordance with an emergency order of the Illinois Supreme Court related to COVID-19. The appellate court found defendant forfeited his speedy trial challenge by failing to move to dismiss in the trial court. He could not establish plain error because there was no clear or obvious error. To the extent the supreme court's response conflicted with the speedy trial statute, the court's order prevails in light of its basic authority over the procedural administration of the courts. Moreover, the error could not be "clear" because even if defendant's argument had merit, the error would not have been obvious to the trial judge who was following an order of a higher court at the time it tolled the speedy trial statute.

While defendant's brief mentioned a violation of his constitutional right to a speedy trial, the defendant did not cite the relevant standards and therefore the issue was insufficiently briefed and forfeited. Even if the court reviewed for plain error (which defendant did not request), the court would have found no constitutional violation because, of the four relevant factors, (1) the defendant's assertion of the right; (2) the length of the delay; (3) the reasons for the delay; and (4) prejudice to the defendant), only the first weighed heavily in favor of defendant. Thus, no clear or obvious error occurred.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

STATUTES

§47-3(b)(7)(a)

People v. Mayfield, 2023 IL 128092 (3/23/23)

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(Defendant was represented by Assistant Defender Zachary Wallace, Elgin.)

TRAFFIC OFFENSES

§§49-2(c), 49-2(d)

People v. Carlson, 2023 IL App (2d) 210782 (3/23/23)

On appeal from a conviction of aggravated DUI, defendant argued that the State's evidence was insufficient to establish that his BAC was 0.08 or greater at the time of his driving. Specifically, defendant argued that while the blood test revealed a BAC of 0.16, his blood was not drawn until two and a half hours after his arrest. The appellate court held that the delay went to the weight of the BAC evidence, but did not necessarily render it insufficient. Extrapolation evidence is not necessary where the tested level is above the statutory limit.

Instead, when there is a delay, BAC results should be viewed in light of the circumstances surrounding the arrest. Here, that evidence included defendant's statement that he had not consumed any alcohol since 10 p.m., nearly four hours before his arrest. Given defendant's statement, it was reasonable to infer that, by the time of his driving, defendant would have fully absorbed the alcohol he had consumed and his BAC would no longer be rising. And, by the time his blood was drawn and tested more than two hours later, his BAC would have been even lower than it had been at the time of the traffic stop. Thus, the evidence was sufficient to establish his guilt of DUI with a BAC over 0.08.

Further, the trial court did not err in relying on a delinquency DUI adjudication to find defendant guilty of aggravated DUI under 625 ILCS 5/11-501(d)(1)(A). That statute provides that a person is guilty of aggravated DUI if "the person committed a [DUI] violation...for the third or subsequent time." The statutory language is not dependent on whether the violation was committed when the person was a minor or an adult in that it does not require a "conviction." Thus, defendant's delinquency adjudication for DUI qualified as a predicate DUI violation.

TRIAL PROCEDURES

§§51-2(b), 51-6

People v. Talidis, 2023 IL App (2d) 220109 (3/29/23)

Prior to his DWLR trial, defendant's private attorney withdrew over a disagreement about discovery, and defendant moved to proceed *pro se*. The court accepted defendant's waiver of counsel. After six months of continuances so that defendant could file motions, defendant never filed any, and the court appointed standby counsel. Four days later, on the day of trial, defendant refused to participate. The court ordered standby counsel to act as counsel of record. Counsel asked for a continuance to prepare, but the trial court denied the motion, reasoning that an

attorney appointed for a defendant tried *in absentia* need not be prepared for trial under 725 ILCS 5/115-4.1(a). Defendant was found guilty, and on appeal, argued the court erred in denying the request for a continuance.

The appellate court affirmed. It initially determined that section 115-4.1(a), which sets forth the procedures for a trial *in absentia*, including the appointment of counsel, did not apply to defendant. See **People v. Eppinger**, 2013 IL 114121 (section 115-4.1 applies only to defendants not in custody). As such, before reaching the ruling on the continuance, the appellate court first determined whether the court erred in appointing counsel despite defendant's desire to represent himself. The appellate court found a proper termination of the right to self-representation. Defendant intentionally disrupted the trial process, first dragging it out for several months with false assurances of an imminent motion, and then refusing to participate on the day of trial. Appointing counsel at this point was a proper exercise of discretion. For similar reasons, the trial court exercised proper discretion when it appointed standby counsel as the counsel of record.

Nor did the trial court error in denying counsel's request for a continuance. A court's decision to deny a continuance for the preparation of trial is reviewed for an abuse of discretion. Reviewing courts consider several factors, including the movant's diligence, the seriousness of the charges, judicial economy, the complexity of the case, and the reason for counsel's unpreparedness. Here, although counsel acted diligently in requesting the continuance, and only two witnesses would be inconvenienced, other factors supported the denial of the continuance, including the fact that counsel "had at least the lunch break to prepare for defendant's case, which was not complex."

Finally, the court found counsel was not ineffective where she participated in *voir dire*, made objections, moved to suppress evidence, cross-examined witnesses, and argued in opening and closing.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

VENUE & JURISDICTION

§52
People v. Cook, 2023 IL App (4th) 210621 (3/9/23)

Defendant pled guilty to felony murder, then filed a motion to reconsider sentence within 30 days. He did not file a notice of motion as required by 730 ILCS 5/5-4.5-50(d). After no action was taken on the motion for a year, a PD discovered the motion and refiled it, along with a motion to withdraw the plea. The motion alleged that his plea was coerced and that his sentence was excessive. The trial court denied the motion.

On appeal, defendant alleged that comments critical of plea counsel, made during his testimony on the motion to withdraw, entitled him to a **Krankel** remand. The State argued the appeal should be dismissed for lack of jurisdiction because the notice of appeal was filed more than a year after the original motion.

The appellate court first held that it had jurisdiction. Defendant filed a timely motion to reconsider. Although the motion was not accompanied by a notice of motion, this defect was not jurisdictional. Section 5-4.5-50(d) states that a motion must be filed within 30 days to be considered timely. It does not state that a lack of notice of filing renders it untimely; no consequences are attached to the notice requirement. While this holding contradicts several prior cases, they all involved an earlier version of the statute which specifically stated a motion was timely filed only if it included a notice of motion.

Defendant was not entitled to a **Krankel** remand, however. While defendant made some statements during his testimony that could be considered critical of his attorney – he pled because his case was not "moving forward"; counsel did not inform him about a pending favorable statute; no one "helped" him with his case – the statements were contradicted by the record, and regardless, none amounted to"clear claims asserting ineffective assistance of counsel" required by **People v. Ayres**, 2017 IL 120071.

(Defendant was represented by Assistant Defender Brian Josias, Chicago.)

VERDICTS

§53-2

People v. Davidson, 2023 IL App (2d) 220140 (3/31/23)

Guilty verdicts for both voluntary manslaughter and child endangerment were legally inconsistent, requiring remand for a new trial.

Defendant was found guilty of two counts of child endangerment (720 ILCS 5/12C-5), and one count of involuntary manslaughter. The charges stemmed from the death of defendant's six year-old stepdaughter, K.R., who overdosed on olanzapine, a medication prescribed to her mother, defendant's wife. The manslaughter charge (Count 1), and one of the child endangerment charges (Count 2), were based on providing K.R. with olanzapine. The remaining child endangerment charge (Count 3) was based on allowing her access to olanzapine. Defendant argued that manslaughter requires a showing of recklessness, while child endangerment requires a showing of knowledge, making them legally inconsistent.

Legally inconsistent verdicts occur when an essential element of each crime would have to both exist and not exist, even though the offenses arise out of the same set of facts. Here, Counts 1 and 2 alleged the same conduct, but with different mental states – the mental state of knowledge does not include the mental state of recklessness. Thus, defendant could only have had one of these mental states at the time he provided the olanzapine, and could not have committed both crimes.

When a reviewing court finds inconsistent verdicts, it must remand for a new trial on all charges "related thereto." Thus, while Count 3 may not have been legally inconsistent, reversal was nevertheless required.

(Defendant was represented by Assistant Defender Anthony Santella, Elgin.)

§53-3(b)

People v. Melvin, 2023 IL App (4th) 220405 (3/24/23)

Presence – either actual or virtual – is a necessary element in proving a charge of sexual exploitation of a child pursuant to 720 ILCS 5/11-9.1(a). That is, an individual must do the prohibited acts in the presence of a child in order to be found guilty of sexual exploitation of a child. "Virtual presence" is defined as an "environment that is created with software and presented to the user and or receiver via the Internet, in such a way that the user appears in front of the receiver on the computer monitor or screen or hand-held portable electronic device, usually through a web camming program. 'Virtual presence' includes primarily experiencing through sight or sound, or both, a video image that can be explored interactively at a personal computer or hand-held communication device or both."

Defendant argued that the State's factual basis for his guilty plea to sexual exploitation of a child was deficient in that it failed to establish his "virtual presence." Specifically, defendant argued that his sending of digital photographs of his exposed penis to a Facebook account which he believed to belong to a 16-year-old girl was insufficient to establish his "virtual presence" as a matter of law. Defendant relied on **People v. White**, 2021 IL App (4th) 200354, where the Court found Snapchat photographs, with no conversation between the sender and the recipient, were insufficient to establish that the sender had exposed herself in the virtual presence of the recipient.

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As to the facts, the court noted that defendant here sent the explicit images in the context of an ongoing lewd conversation between himself and the recipient, rather than sending photographs only as in **White**. This was sufficient to satisfy the "virtual presence" element, at least on the limited record available in this guilty plea case.

The court also rejected defendant's argument that his convictions for both sexual exploitation and distribution of harmful materials were improper on one-act, one-crime grounds. While both involved the physical act of sending pictures of his exposed penis, sexual exploitation contains the additional act of presence. Further, while defendant made no argument that one offense was a lesser-included of the other, the court engaged in a brief lesser-included-offense analysis and concluded that under the abstract elements approach, the Class A misdemeanor sexual-exploitation offense's inclusion of the virtual-presence element rendered it not a lesser-included offense of Class 4 distribution of harmful materials which contains no presence requirement.

(Defendant was represented by Assistant Defender Gregory Peterson, Springfield.)

WAIVER - PLAIN ERROR - HARMLESS ERROR

§§54-3(d)(1)(b), 54-3(d)(3)(b)

People v. Ward, 2023 IL App (1st) 190364 (3/31/23)

Defendant was convicted of first degree murder and two counts of aggravated battery with a firearm arising from a 2013 shooting which resulted in the death of 15-year-old Hadiya Pendleton and injuries to two other teens, Lawrence Sellers and Sabastian Moore. The appellate court reversed and remanded for a new trial, concluding that the trial court erred in failing to suppress defendant's custodial statements because they were taken in violation of his right to remain silent.

Defendant's interrogation began shortly after midnight, with the giving of **Miranda** warnings. After a little more than an hour of questioning, defendant stated, "I ain't got nothin' else to say." Questioning stopped, and detectives left the room. Approximately 90 minutes later, the detectives returned and questioned defendant again. That questioning lasted about 45 minutes, at which time defendant said, "[I] [g]ot nothin' to say." The detectives again left the room. Approximately three hours later, after defendant was fingerprinted, the same two detectives attempted to initiate additional questioning, and defendant indicated he did not want to say anything else. Up to this point, defendant had not made any incriminating statements. Approximately five hours later, and twelve hours after the interrogation first began, a second pair of detectives questioned defendant. They did not provide

defendant fresh **Miranda** warnings, and defendant ultimately made the inculpatory statements at issue here.

On these facts, the court concluded that defendant had repeatedly invoked his right to remain silent. Although defendant's invocations did not come immediately after he was given **Miranda** warnings, the court relied on **People v. Cox**, 2023 IL App (1st) 170761, in holding that a delay between warnings and invocation is not the determinative factor. More telling here was the response of defendant's interrogators. After each invocation, the detectives halted their questioning and left the room for some time, indicating that they plainly understood defendant's comments to be an invocation of his right to remain silent.

Once a defendant has invoked his right to silence, interrogation may be resumed and subsequent statements may be admissible only if the defendant's right to remain silent was "scrupulously honored." Here, the State argued only that defendant had not invoked his right to silence and did not even suggest that his invocation had been scrupulously honored. Accordingly, the court held that defendant's statements should have been suppressed.

Additionally, the court rejected the State's harmless error argument. While defendant's confession was not the focus of the State's closing argument at trial, closing arguments are not evidence. And, more importantly, the question was not whether the State believed at trial that the evidence was sufficient to convict without defendant's confession, but rather whether the State could "prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." Given that confessions carry significant weight, and that the trial evidence here was sufficient but not overwhelming, the court held that this was not "one of those rare cases" where it was beyond reasonable doubt that the jury would have found defendant guilty absent his confession.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

WEAPONS

§55-5
People v. Mosley, 2023 IL App (1st) 200309 (3/23/23)

Defendant argued that the State failed to prove beyond a reasonable doubt that he possessed a firearm which was recovered from the floorboard of a vehicle in which he was a passenger. In particular, defendant noted that he did not own the vehicle, and three other adults were also present in the vehicle at the time of the traffic stop. While one officer testified that he saw defendant place an object on the floor of the

vehicle, another officer said he did not observe defendant put anything on the floor. The officers were not wearing body cameras, and no physical evidence linked defendant to the firearm.

Viewing the evidence in the light most favorable to the prosecution, the appellate court found that a rational fact finder could find beyond a reasonable doubt that defendant possessed the weapon. The jury could properly choose to believe the testimony of the officer who said he saw defendant put something on the floor, especially given that the gun was recovered from the area where defendant had been seated in the vehicle. Accordingly, the appellate court affirmed defendant's conviction of unlawful possession of a weapon by a felon.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

WITNESSES

§56-5
People v. Turner, 2023 IL App (1st) 191503 (3/27/23)

The appellate court majority rejected defendant's claims that post-conviction counsel provided unreasonable assistance by failing to supplement the petition with documents that would support his various claims of ineffective assistance of trial counsel, including his claim that counsel prevented him from testifying. The appellate court would not presume that any of the possible supporting documents suggested by defendant would help his case, given that the Rule 651(c) certificate filed by post-conviction counsel created a rebuttable presumption that no further amendments were necessary.

In upholding the dismissal, the appellate court rejected defendant's reliance on **People v. Jackson**, 2021 IL App (1st) 190263. In **Jackson**, the appellate court remanded a case to the second stage to determine whether PC counsel tried to obtain a specific piece of evidence in support of defendant's claim. The appellate court here found **Jackson** wrongly decided for several reasons, including its failure to acknowledge the rebuttable presumption. Disagreeing with defendant's argument that the record here, as in **Jackson**, was "silent" as to PC counsel's efforts, the appellate court noted that a 651(c) certificate does create a record by creating a presumption that counsel considered additional evidence but found it unnecessary. Unless contradictory evidence exists, the presumption remains in tact.

Finally, the majority rejected defendant's argument that PC counsel should have withdrawn rather than stand on issues that, without further documentation, cannot meet the second stage standard. **People v. Greer**, 212 Ill. 2d 192 (2004) does not require withdrawal unless further representation creates ethical issues, and

requiring withdrawal raises its own set of concerns, such as making a record of potentially damaging information uncovered by counsel's investigation.

The dissent would have found unreasonable assistance based on the failure to provide defendant's affidavit in support of his claim that his right to testify was "impeded" by trial counsel. The dissent found the admonishments given to defendant about his right to testify were inadequate to capture the pressures he may have been under to not contradict his attorney's advice not to testify. The dissent noted that the ABA recommends much more detailed admonishments in order to truly determine voluntariness.

(Defendant was represented by Assistant Defender Adrienne Sloan, Chicago.)